Study G-200 April 8, 2011

First Supplement to Memorandum 2011-17

Charter Schools and the Government Claims Act: Availability of Insurance

Memorandum 2011-17 discussed the legal and policy implications of treating charter schools as public entities for the purposes of the Government Claims Act. One possible policy issue was raised in the memorandum, but not fully explored.

Gregory V. Moser, writing on behalf of the California Charter Schools Association, had expressed concern that charter schools are in a double bind, because they have some public entity responsibilities that could lead to liability, without the protections of public entity immunities. Some of these types of liability would not be covered by readily available liability insurance.

> [This] uninsurability, coupled with the lack of scope of public entity immunities, leaves charter schools more vulnerable than other public schools or private schools which have no public entity responsibilities.

See Exhibit p. 1. See also Memorandum 2011-7, Exhibit pp. 11-13.

In other words, Mr. Moser is concerned that charter schools face unique and uninsurable liabilities as a result of their hybrid status under existing law. For liability to be both unique and uninsurable, it must meet *all* of the following criteria:

(1) Traditional public schools don't face the liability (as a result of immunities conferred by the Government Claims Act).
(2) Private schools don't face the liability (because it results from uniquely public activity).
(3) Readily available liability insurance won't cover the liability.

The staff requested that Mr. Moser provide specific examples of this problem, with a focus on how the problem manifests in actual practice. See Memorandum 2011-17, p. 16. The expectation was that the issue would be discussed more fully, once the requested information was received.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

Mr. Moser has now written to provide the requested examples. His letter, which is attached as an exhibit, is discussed below.

After considering the material discussed in this memorandum, the Commission should decide whether the problem of unique and uninsurable charter school liabilities presents a policy issue that should be identified and weighed, along with other policy issues, in the Commission's report.

FREEDOM OF EXPRESSION

Education Code Section 48907 protects specified expressive rights of students in public school. In 2010, the section was amended to make it applicable to charter schools. See 2010 Cal. Stat. ch. 142 (SB 438 (Yee)). As amended, the section reads:

> 48907. (a) Pupils of the public schools, including charter schools, shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material that so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.
>
> (b) The governing board or body of each school district or charter school and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction.
>
> (c) Pupil editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of pupil publications within each school to supervise the production of the pupil staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section.
>
> (d) There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to a limitation of pupil expression under this section.

> (e) "Official school publications" refers to material produced by pupils in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.
>
> (f) This section does not prohibit or prevent the governing board or body of a school district or charter school from adopting otherwise valid rules and regulations relating to oral communication by pupils upon the premises of each school.
>
> (g) An employee shall not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against solely for acting to protect a pupil engaged in the conduct authorized under this section, or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 2 of Article I of the California Constitution.

Mr. Moser believes that a charter school could face liability for an alleged violation of this section that would not be covered by general liability insurance:

> If a charter school has liability for failure to comply with Education Code Section 48907 or the First Amendment under 42 U.S.C. § 1983, it will not be for negligence, but for intentional conduct. For example, a charter school could be sued for damages and attorneys fees for adopting a restrictive dress code that violated the religious freedom of particular students to wear certain headgear, or for enforcing a policy forbidding students from distributing political handbills deemed inappropriate or offensive by the school's administration. Consequently, insurers would refuse to defend or indemnify a charter school facing a claim brought to remedy violations of student or employee rights under section 48907.
>
> Moreover, even if a claim for [enforcement of] section 48907 was brought solely for injunctive or declaratory relief, a general liability policy will not provide coverage. A typical commercial policy exclusion reads, "This section does not insure against … claims, demands, or actions seeking relief or redress in any form other than monetary damages … or fees … which the assured may be obligated to pay as a result of any adverse judgment for declaratory relief or injunctive relief."

See Exhibit p. 2 (footnote omitted).

The staff is not sure of the extent to which Section 48907 provides a good example of liability unique to charter schools, because it is not clear that a traditional public school would always be immune from suit under the section. There are two reasons for the staff's uncertainty on this point.

First, the Government Claims Act does not immunize public entities from actions for nonmonetary relief, such as an injunction, mandamus, or declaratory relief. See Gov't Code § 814 ("Nothing in this part affects liability based on

contract or the right to obtain relief other than money or damages against a public entity or public employee."); Cal. Government Tort Liability Practice §§ 9.85-9.87, at 599-602 (Cal. Cont. Ed. Bar, 4th ed. 2011).

Consequently, if a student sued a charter school solely for equitable relief, to enjoin action in violation of Section 48907, the charter school would seem to be in the same position as a traditional public school. Both would be susceptible to suit, notwithstanding the Government Claims Act. In fact, the case cited by Mr. Moser provides an example of a traditional public school being sued for injunctive and declaratory relief for an alleged violation of Section 48907. There is nothing in the published opinion to suggest that the Government Claims Act posed any obstacle to the underlying action. See *Smith v. Novato Unif. School Dist.*, 150 Cal. App. 4th 1439, 59 Cal. Rptr. 3d 508 (2007).

Secondly, even if a claim for money damages could be framed under Section 48907, it is not clear that the immunities conferred by the Government Claims Act would necessarily apply. The strongest argument for immunity would be under Government Code Section 820.2, which immunizes a public employee for a discretionary policy decision. However, if a school's policy decision violates a statutory duty, it may not be considered sufficiently "discretionary" to justify application of the immunity. See Cal. Government Tort Liability Practice § 10.14, at 624-25 (Cal. Cont. Ed. Bar, 4th ed. 2011) ("public officers and employees have no discretionary authority to refuse to perform a mandatory duty or to violate statutory law governing the scope and character of their duties").

However, the intersection between liability for violation of a mandatory duty and immunity for discretionary action is not perfectly clear. Consequently, the application of discretionary immunity to a decision that is alleged to violate Section 48907 would depend on the specific facts of the case. It seems likely that some alleged violations of Section 48907 would be immunized under Government Code Section 820.2, but others would not.

Consequently, the unique liability problem would only appear to exist with respect to a specific subset of actions under Section 48907, those that involve a claim for money damages and a discretionary policy decision.

BREACH OF STATUTORY DUTIES

Mr. Moser also states that general liability insurance is unavailable for conduct that violates a statutory duty:

> Many statutes impose duties on charter schools. Claims based on violations of these laws would similarly be excluded from coverage under a general commercial liability policy. Commercial policies routinely exclude coverage of "wrongful acts," such as liabilities for breaches of mandatory duties imposed by statute. (E.g., "Wrongful act means any violation or alleged error … act or neglect or breach of duty … including an employment practice violation … and violation of civil rights by the assured ….") There are many, many examples of this.

Exhibit p. 2 (footnote omitted). Examples cited by Mr. Moser are discussed below.

Educational Employment Relations Act

Mr. Moser notes a case in which the California Teachers Association claimed that a charter school had violated the "Educational Employment Relations Act" (Gov't Code § 3540 *et seq.*), by firing three teachers for organizing activities protected by the Act. He writes: "Under the 'wrongful acts' exclusion, this claim was not covered by any insurance." See Exhibit p. 3; *California Teachers Assn v. Public Employment Relations Bd.*, 169 Cal. App. 4th 1076, 87 Cal. Rptr. 3d 530 (2009).

The staff does not believe that this case involves unique and uninsurable liability. The Educational Employment Relations Act expressly authorizes adjudicative proceedings against public schools. Specifically, the statute authorizes the Public Employment Relations Board ("PERB") to investigate and adjudicate alleged violations of the Act. See Gov't Code § 3541.5. In addition, the Act provides for limited judicial review of a PERB decision, by means of a writ for extraordinary relief. See Gov't Code § 3542(c). With respect to those proceedings, charter schools and traditional public schools appear to be in the same position. Neither enjoys immunity.

However, Mr. Moser may be raising a slightly different concern, as he goes on to write:

> At the same time, the charter school board members were exposed to personal liability for making the important decision as to whether to retain or terminate these teachers.
>
> In an identical situation, school district board members would face no such personal exposure because of the protections of the GCA. (See, Caldwell v. Montoya (1995) 10 Cal. App. 4th 972.)

See Exhibit p. 3.

The staff could not find any basis for the personal liability of board members in either *California Teachers Assn v. Public Employment Relations Bd.* or the Educational Employment Relations Act. The concern may be that once PERB has made a finding of illegal termination of employment, a separate suit would then be filed for wrongful termination.

In such a suit, a public employee would be immunized for a discretionary policy decision. See *Caldwell v. Montoya*, 10 Cal. 4th 972, 897 P.2d 1320, 42 Cal. Rptr. 2d 842 (1995) (Government Claims Act immunity for discretionary policy decision immunized school board members from personal liability, under Fair Employment and Housing Act and the common law, for vote to terminate employment of school superintendent).

Thus, a charter school and a traditional public school would seem to be in different positions with respect to the potential liability for wrongful termination of employment that is based on a discretionary policy decision. Traditional public school board members would be shielded from some liability, but the board members of a charter school would not.

However, the potential exposure of charter schools to liability for wrongful termination of employment (or other employment related claims) would seem to be similar in kind to the exposure faced by private schools for the same types of claims. Consequently, it is not clear that these sorts of employment suits present "unique" liability for charter schools.

Furthermore, if the concern is the potential for personal liability of charter school board members, could that liability be addressed by obtaining Directors and Officers Liability insurance, or Employment Practices Liability insurance? It is not clear to the staff why those forms of insurance would be inadequate in a typical employment practices lawsuit.

Employee Misrepresentations

Mr. Moser points out that charter schools are obliged to maintain student records. See Exhibit p. 3. He asserts that a charter school could face liability "if they fail to keep records, or maintain erroneous records." *Id*.

He also points out that a traditional public school would be immunized against liability for employee misrepresentations in school records (citing *Grenell v. City of Hermosa Beach*, 103 Cal. App. 3d 864; 163 Cal. Rptr. 315 (1980)). See Exhibit p. 3. *Grenell* involved the immunity conferred under the Government

Claims Act for a public employee's negligent or intentional misrepresentations. See Gov't Code §§ 818.8, 822.2.

Thus, a traditional public school would have immunity for employee misrepresentations that a charter school would not.

However, a charter school appears to be in essentially the same position as a private school in this regard. Although private schools are not subject to the *same* statutory record keeping requirements that govern charter schools, they are required by law to keep many records. See, e.g., Educ. Code §§ 33190, 33191, 44237, 48202, 48222, 49061, 49068, 49069-49070. Thus, both charter schools and private schools face potential liability for misrepresentations in their statutorily mandated records. It is therefore unclear how this provides an example of unique charter school liability.

Furthermore, the staff is unclear on why general liability insurance would not be adequate to protect against liability that is based on *negligent* misrepresentations in a school's records.

Other Miscellaneous Examples

Mr. Moser concludes with a list of other miscellaneous examples of liability that a charter school might face as a result of a "statutory or Constitutional duty to students or the public" which are "not duties imposed on private school officials" and which would be excluded from insurance coverage as "'wrongful acts' based on statutorily-imposed duties." See Exhibit pp. 3-4. He concludes:

> This creates a situation which is unfair, at best, and at worst discourages those who might otherwise participate in the governance and operation of a charter school.

Id. at 4.

In the interests of expediting the release of this memorandum, the staff has performed only a cursory analysis of the miscellaneous examples. The staff's tentative thoughts on these examples are discussed briefly below.

- **Child abuse investigation and reporting.** Mr. Moser suggests that "a charter school employee should be able to carry out his or her reporting and investigatory duties when there is suspected child abuse involving a student — without fear of suit." See Exhibit p. 3; *Newton v. County of Napa*, 217 Cal. App. 3d 1551, 266 Cal. Rptr. 682 (1990). However, this does not appear to be a unique issue for charter schools. Teachers, administrators, and other employees of private schools also appear to be mandatory reporters of suspected

child abuse under the Child Abuse Neglect and Reporting Act. See Penal Code § 11165.7.

- **Misrepresentation.** Mr. Moser believes that a charter school should not be liable for misrepresentations made by a school counselor. See Exhibit p. 3; *Brown v. Compton Unif. School Dist.*, 68 Cal. App. 4th 114, 80 Cal. Rptr. 2d 171 (1998); *Chevlin v. Los Angeles Community College Dist*, 212 Cal. App. 3d 382, 260 Cal. Rptr. 628 (1989). However, it is not clear that such liability would be unique to charter schools. It seems likely that a private school would face the same potential liability for injuries resulting from counselor misrepresentations.
- **Civil rights.** Mr. Moser cites a case in which a community college was immunized from liability under the "Bane Act" (Civil Code Section 52.1). The Bane Act provides a cause of action, for equitable relief or money damages, against a person who interferes with the exercise or enjoyment of a constitutional or legal right. See Exhibit p. 3; *O'Toole v. Super. Ct.*, 140 Cal. App. 4th 488; 44 Cal. Rptr. 3d 531 (2006). Consequently, liability for suit under the Bane Act involving a request for money damages would seem to be unique to charter schools.
- **Suspension and expulsion.** Mr. Moser writes that a charter school principal should be protected from suit for suspending or expelling a student. See Exhibit p. 3. He cites to a case in which a school was sued, on a number of theories, when a student assaulted and severely injured another student. See *Skinner v. Vacaville Unif. School Dist.*, 37 Cal. App. 4th 31, 43 Cal. Rptr. 2d 384 (1995).

  In that case, the court held that a decision on whether to expel a potentially dangerous student was a discretionary policy decision immunized under Government Code Section 820.2. Thus, a charter school would seem to be in a different position than a traditional public school with respect to liability resulting from such a decision. However, the staff does not see why liability for an expulsion or suspension decision would be any different in a charter school than it would be in a private school. In either setting, a claim might be brought on the theory that negligent decisionmaking proximately caused some later harm.
- **Negligent supervision of schoolyard.** Mr. Moser asserts that a charter school's policy decision on the necessary extent of schoolyard supervision should be immunized from liability. See Exhibit p. 3. He cites to a case in which the court acknowledged that such a decision could be immune under Government Code Section 820.2. See *Biggers v. Sacramento City Unif. School Dist.*, 25 Cal. App. 3d 269, 101 Cal. Rptr. 706 (1972). It therefore does appear that a charter school could face liability for which a traditional public school would be immune. However, it is not clear that this liability would be unique to a charter school. It seems likely that a

claim of negligent supervision could also be brought against a private school on similar facts.

CONCLUSION

The staff's analysis of the examples provided by Mr. Moser suggests that there could be some scope for unique and uninsurable liability for charter schools. The strongest examples of unique liability would be:

- A claim for money damages, for a violation of Education Code Section 48907 that is the result of a discretionary policy decision.
- A claim for money damages under the Banes Act, for interference in the exercise or enjoyment of a protected civil right, which is the result of a discretionary policy decision..

The other examples cited by Mr. Moser seem to involve liability that is shared, to some extent, by either traditional public schools or private schools. In addition, it appears that some of the examples involve liabilities that could perhaps be covered by readily available insurance.

The issues discussed in this memorandum are complex, involving the intersection of the Government Claims Act, general tort principles, specific education law principles, and limitations on insurance coverage. Mr. Moser and other subject matter experts should feel free to comment further, on any of the points discussed above. In particular, it would be helpful to hear examples of how the sorts of liability discussed above have manifested in actual cases.

Respectfully submitted,

Brian Hebert
Executive Director

Procopio®
Procopio, Cory, Hargreaves & Savitch LLP

Gregory V. Moser
Direct Dial: (619) 515-3208
E-mail: GVM@procopio.com

March 29, 2011

Brian Hebert, Executive Secretary
Cindy Dole, Visiting Fellow
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Follow-up Comments on Calfornia Law Revision Commission Study G-200 on Charter Schools and Insurance Coverage Issues

Dear Mr. Hebert and Ms. Dole:

On behalf of the California Charter Schools Association ("CCSA"), we appreciate the opportunity to respond to your invitation to elaborate on the uninsurability of many exposures faced by charter schools based upon their public entity responsibilities. As we testified, this uninsurability, coupled with the lack of scope of public entity immunities, leaves charter schools more vulnerable than other public schools or private schools which have no public entity responsibilities. We urge the Commission to recommend legislation expressly extending Government Claims Act ("GCA") coverage to charter schools.

We will endeavor here to identify examples of specific types of liabilities that result from being part of the public school system that are not covered by liability insurance. For each type of liability, we explain why insurers will not (or cannot) cover it, how liability arises in the real world, and how private schools can mitigate –or simply avoid—such risks.

Example: Alleged First Amendment Violations

In 2010, the California Legislature enacted SB 438, expressly treating charter schools as governmental agencies for purposes of the First Amendment and the corresponding provision of the California Constitution. By making Education Code section 48907 applicable to charter schools, the Legislature requires charter schools to adopt and administer policies that recognize employees' and students' free speech rights under the federal and state constitutions. (*Smith v. Novato Unified School Dist.* (2007) 150 Cal. App. 4th 1439 [district and their employees already have potential liability for violating Education Code §48907].)

Every general liability policy or self-insurance contract which we have seen contains an exclusion for "Bodily injury, property damage or personal injury which the assured *intended or expected*."[1] Insurance Code section 533 expressly provides that "An insurer is not liable for a

[1] Quote from the 2004 Form of excess insurance coverage contract.

loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." Thus, insuring against intentional misconduct is against the public policy of the State of California.

If a charter school has liability for failure to comply with Education Code section 48907 or the First Amendment under 42 U.S.C. §1983, it will not be for negligence, but for intentional conduct. For example, a charter school could be sued for damages and attorneys fees for adopting a restrictive dress code that violated the religious freedom of particular students to wear certain headgear, or for enforcing a policy forbidding students from distributing political handbills deemed inappropriate or offensive by the school's administration. Consequently, insurers would refuse to defend or indemnify a charter school facing a claim brought to remedy violations of student or employee rights under section 48907

Moreover, even if a claim for enforce section 48907 was brought solely for injunctive or declaratory relief, a general liability policy will not provide coverage. A typical commercial policy exclusion reads, "This section does not insure against . . . claims, demands, or actions seeking relief or redress in any form other than monetary damages . . . or fees . . . which the assured may be obligated to pay as a result of any adverse judgment for declaratory relief or injunctive relief."[2]

The GCA provides protections for public employees and board members who implement or approve, or pursue an agency policy that turns out to violate section 48907 or the constitutional rights of students or employees. (Gov. Code §§ 820.2; 820.6, 820.9, 821.) Of course, private school officials don't fact such potential liabilities because they are *private* organizations which have no such duties. If the GCA does not apply to charter school officials, they are *uniquely* exposed among school officials in California to claims under section 48907.

Example: Breach of Statutory Duties Generally

Many statutes impose duties on charter schools. Claims based on violations of these laws would similarly be excluded from coverage under a general commercial liability policy. Commercial policies routinely exclude coverage of "wrongful acts," such as liabilities for breaches of mandatory duties imposed by statute. (E.g., "Wrongful act means any actual or alleged error . . . act or neglect or breach of duty. . . including an employment practice violation . . . and violation of civil rights by the assured . . .."[3]) There are many, many examples of this.

For example, under the Charter Schools Act, charter school employees—unlike private school employees—may organize under the supervision of the Public Employee Relations

---

[2] Id.

[3] Id.

Board. As employers, charter schools must follow the laws giving their employees such rights. (Ed. Code §47611.5.)

In *California Teachers Assn. v. Public Employment Relations Board* (2009) 169 Cal. App. 4th 1076, the California Teachers Association claimed that a charter school violated the Educational Employment Relations Act (EERA; Gov. Code §3540 et seq.) when it terminated the employment of three teachers, one of whom served on the charter school's board. Under the "wrongful acts" exclusion, this claim was not covered by any insurance. At the same time, the charter school board members were exposed to personal liability for making the important decision as to whether to retain or terminate these teachers.

In an identical situation, school district board member would face no such personal exposure because of the protections of the GCA. (See, *Caldwell v. Montoya* (1995) 10 Cal.App.4th 972 .)

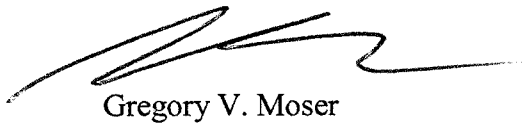
A second example. As a matter of course, charter schools keep student records, including attendance records. (E.g., Ed. Code §47612.5(a)(2).) Yet, without the protections of the GCA they are exposed to potential liability if they fail to keep records, or maintain erroneous records. The GCA protects school districts against liability solely because of errors in recordkeeping. (See, *Grenell v. City of Hermosa Beach* (1980) 103 Cal.App.3d 864 (city not liable because homebuyer relied on erroneous city records showing dwelling unit was properly permitted). Private schools have no comparable recordkeeping obligations.

There are many other examples. A charter school official should be able to carry out his or her reporting and investigatory duties when there is suspected child abuse involving a student—without fear of suit. (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551.) A school and school counselor should not be personally exposed to liability for the refusal of a college association to accept coursework from a charter high school (*Brown v. Compton Unified School District* (1998) 68 Cal.App.4th 114). Charter schools should be protected against a student's claim that requirements for passing a course were fraudulently concealed by a teacher (*Chevlin v. Los Angeles Community College District* (1989) 212 Cal.App.3d 382).) Charter school employees should be able to enforce such policies as school dress codes, rules on student assemblies, picketing on campus, searching of lockers, or seizure of student property, without having to be experts on constitutional law. (*E.g., O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488.) A principal should be protected from suit for suspending, or expelling a student, or rejecting funds associated with religious advertisements. (*Skinner v. Vacaville Unified School District* (1995) 37 Cal.App.4th 31; *Nicole M. v. Martinez Unified School District* (1997) 964 F.Supp. 1369.) If charter school officials consider how much supervision of the schoolyard is needed, they should be protected from liability. (*Biggers v. Sacramento City Unified School District* (1972) 25 Cal.App.3 269.)

In each of these situations, charter school officials have a comparable statutory or Constitutional duty to students or the public. These are not duties imposed on private school officials. Their district school counterparts have the protections of the GCA. Insurance excludes coverage for these "wrongful acts" based on statutorily-imposed duties. This creates a situation which is unfair, at best, and at worst discourages those who might otherwise participate in the governance and operation of a charter school.

While it is true that charter schools are free from *some* of the statutory duties imposed on their school district counterparts, the Charter Schools Act (and many other provisions of state and federal law) impose obligations and responsibilities on charter schools which private schools do not have. As a general rule, the liabilities arising out of statutory or Constitutional obligations are excluded "wrongful acts" or are uninsurable because any violation is deemed to be "intentional." The GCA directly addresses these exposures by providing discretionary and other immunities to public officials. (Good examples are Government Code §§ 820.2; 820.6, 820.9 and 821.) Charter school officials deserve no less protection..

Very truly yours,



Gregory V. Moser